

SERVICE DATE – AUGUST 27, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35794

KAN RAIL, INC.—ACQUISITION AND OPERATION EXEMPTION—IN  
WAPAKONETA, OHIO

Decided: August 26, 2014

Digest:<sup>1</sup> Because the Board is unable to determine, based on the record before it, whether the class exemption process is appropriate in this case, Kan Rail, Inc.’s notice of exemption is rejected.

BACKGROUND

On April 22, 2014, Kan Rail, Inc. (Kan Rail), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to lease and operate approximately two-thirds of a mile of existing railroad track, as well as approximately one-half of a mile of additional track to be constructed, all at a transloading facility located in Wapakoneta, Ohio. Kan Rail stated in its notice of exemption that it was formed for the purpose of leasing and operating all rail lines and equipment owned by AIP Logistics, Inc., and KanTrade Ltd. (the Sister Entities). The notice of exemption also stated that the Sister Entities propose to lay approximately 2,615 linear feet of additional track, to be leased to and operated by Kan Rail, and that the proposed time schedule for completion of the additional track was May 1, 2014.

On April 29, 2014, the Board issued a decision explaining that § 1150.31, the regulation under which the notice of exemption was filed, “applies to all acquisitions and operations under [49 U.S.C. §] 10901,” but does not cover construction. The Board stated that Kan Rail’s notice of exemption under this section appears to involve construction of a line of railroad, in which case Board authorization of the construction, and an environmental review under the National Environmental Policy Act, would be required. The Board further stated that, “[b]ecause the notice of exemption does not provide sufficient information to allow the Board to make a definitive determination that use of the class exemption at 49 C.F.R. § 1150.31 for acquisitions and operations is appropriate here, additional information is necessary.” The Board then directed Kan Rail to file “supplemental information describing in detail whether the activities at issue include construction of a line of railroad subject to the Board’s licensing authority and, if so, why

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Board authority for the construction has not been sought.” The Board indicated that any ongoing construction activities should cease pending resolution of the matter and that Kan Rail’s exemption would not become effective, if at all, until further order from the Board.

Kan Rail submitted its supplemental filing on June 12, 2014. On July 2, 2014, CSX Transportation, Inc. (CSXT) filed what it described as a reply to Kan Rail’s verified notice of exemption, “contend[ing] that Kan Rail is not proposing to provide common carrier rail service, but instead will be providing an industrial switching service that does not require advance authorization or exemption from the [Board].” For this reason, CSXT requests that the Board deny the exemption sought by Kan Rail. Kan Rail replied to CSXT’s filing on July 22, 2014, with a motion to strike CSXT’s pleading in its entirety or, if CSXT’s filing is considered a motion to dismiss, then Kan Rail argues against dismissal. In response to that pleading, CSXT filed a reply on July 28, 2014, asking the Board to deny Kan Rail’s motion to strike or, in the alternative, to reject Kan Rail’s filing as an impermissible reply to a reply. Both Kan Rail’s and CSXT’s filings will be accepted in the interest of compiling a complete record.

## DISCUSSION AND CONCLUSIONS

The informal, streamlined class exemption process is typically reserved for routine transactions that are uncomplicated and noncontroversial. See, e.g., Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—S. Dakota, FD 34645, slip op. at 2 (STB served Jan. 14, 2005). A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559, slip op. at 5 (STB served May 14, 2012).

CSXT argues that Kan Rail’s proposal does not constitute operation as a rail common carrier. However, Kan Rail’s supplemental filings indicate that it seeks authority to provide common carrier service and CSXT has failed to demonstrate otherwise. Kan Rail’s supplemental filing states that “Additional Tracks [which are to be constructed] T-3, T-5, and T-6 will be used for unloading, loading and storage.” The affidavit attached to the filing states that “[a]s many as 50 different shippers and 100 different consignees, including one-time users, have been served and/or expect to be served by the Facility; and as many as 25 of those shippers actively engage its services currently.” Additionally, in its reply to CSXT, Kan Rail states that it “will be a stand-alone rail carrier, focused solely on providing rail transportation service to customers” and that it “expects to form a good rail partnership with CSXT with a view toward possible expansion and extension opportunities and additional interchanges with CSXT in the future.”

Kan Rail’s supplemental filings, however, fail to clarify the unresolved issues regarding the possible construction of a line of railroad that would require prior approval from the Board. Specifically, Kan Rail fails to address, as requested, “whether the activities at issue include construction of a line of railroad subject to the Board’s licensing authority.” The Board remains unable to determine, based on the additional information submitted, whether the class exemption process is appropriate here. For this reason, the notice of exemption will be rejected.

This is not to say that Kan Rail is foreclosed from obtaining an exemption to lease and operate in the future. It may be that a subsequently filed notice of exemption that adequately

addresses the unresolved construction issue would be appropriate. The information that has been submitted to date, however, does not address the issues and questions that the Board has regarding the construction of track over which Kan Rail seeks to operate.

To the extent that Kan Rail or the Sister Entities wish to pursue construction of a “railroad line,” the constructing entity must seek and obtain Board authorization for that construction. See 49 U.S.C. § 10901.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. To the extent that the parties move to strike various pleadings, those motions are denied in the interest of compiling a more complete record.
2. The notice of exemption is rejected on the grounds specified above.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.